BEFORE THE

STATE OF WISCONSIN

DIVISION OF HEARINGS AND APPEALS

In the Matter of Laboratory Certification of)
Suburban Laboratories of Wisconsin, Inc. and) IH-94-11
Suburban Laboratories, Inc.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On May 31, 1994, the Department of Natural Resources (the DNR or the Department) informed Suburban Laboratories, c/o Mr. Jarrett Thomas, 4140 Litt Drive, Hillside, Illinois, 60162-1183 that Laboratory Certification audits cast significant doubt on the accuracy of laboratory operations at Suburban's Waukesha and Hillside facilities.

On July 19, 1994, the Department of Natural Resources received a request for a contested case hearing pursuant to sec. 227.42, Stats., from Attorney Ann C. Becker on behalf of Suburban Laboratories of Wisconsin, Inc. and Suburban Laboratories, Inc. on the Department's May 31, 1994 decision.

On August 18, 1994, the Department of Natural Resources filed a Request for Hearing with the Division of Hearings and Appeals (the Division).

Pursuant to due notice, hearing was held at Madison, Wisconsin, February 27-28 and March 1-3, 1995, Jeffrey D. Boldt, Administrative Law Judge presiding. The parties submitted written briefs and the last brief was received on August 22, 1995.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

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FINDINGS OF FACT

1. The petitioners in this matter are Suburban Laboratories, Inc. (Suburban-Illinois) and Suburban Laboratories of Wisconsin, Inc. (Suburban-Wisconsin). On July 14, 1994, the petitioners filed a petition with the Department of Natural Resources challenging the Department's May 31, 1994 decision to reject questionable petroleum hydrocarbon data from Suburban laboratories located in Waukesha, Wisconsin and Hillside, Illinois. The petroleum hydrocarbon data is utilized for sites remediated through the Leaking Underground Storage Tank (LUST) Program.

2. On August 24, 1994, the Waukesha Circuit Court, by the Honorable Roger Murphy, entered an Order enjoining the department from ordering blanket resampling of any Suburban GRO, DRO, PVOC and VOC data produced prior to May 31, 1994, and enjoining the Department from sending letters to Suburban's customers questioning the integrity of Suburban's laboratory and/or the validity of its sample results.

3. The DNR Laboratory Certification Program regulates laboratories which perform tests in connection with a program which requires data from a certified or registered laboratory. NR 149.03(8) Wis. Admin. Code. A certified laboratory means a laboratory which performs tests for hire in connection with a "covered program" and which receives certification from the DNR. The LUST Program in the DNR Bureau of Solid and Hazardous Waste Management is "a covered program" requiring certified laboratories pursuant to sec. 144.95(1)(d)(8), Stats. Certified laboratories must meet certain standards and are afforded certain procedural rights under sec. 144.95, Stats., and Chapter NR 149, Wis. Admin. Code. Certification under Chapter NR 149 is not the Department's "endorsement or guarantee of the validity of the data generated." See note following sec. NR 149.01, Wis. Admin. Code. The decision to retroactively reject data generated by the Suburban Laboratories was made by the LUST Program staff and not the Laboratory Certification Program.

4. Suburban-Illinois and Suburban-Wisconsin operate two independent laboratories in Waukesha, Wisconsin, and Hillside, Illinois. Prior to May 31, 1994, both laboratories were certified to perform a number of analytical methodologies required by the state of Wisconsin, including analyses required for the LUST program. Prior to May 31, 1994, each laboratory performed a substantial amount of analysis related to the LUST program. See Thomas (2/27, p. 61 ln. 13-15; p. 63 ln. 23-25; p. 64, ln. 1-7).

5. Suburban-Wisconsin is certified under the Wisconsin Laboratory Certification Program to perform the following test categories: (1) Oxygen Utilization; (2) Nitrogen; (3) Phosphorus; (4) Physical; (5) General 1; (6) General 2; (7) General 3; (8) Metals 1; and (9) Petroleum Hydrocarbons. The petroleum hydrocarbon category includes analyses for diesel range organics ("DRO"), gasoline range organics ("GRO"), and petroleum volatile organic compounds ("PVOC"). (Suburban Ex. 1). Suburban-Illinois was at all relevant times certified under this Program to perform analyses for volatile organic compounds ("VOC") and various inorganics. Thomas (2/27, p. 62 ln. 5-15). Suburban stated that it would use the Wisconsin modified DRO and GRO methods in its application for certification to perform petroleum hydrocarbon analyses. (DNR Ex. 30, Thomas 2/27, p. 195).

6. The DNR determined that "clean samples" which would indicate that any contamination was below Department thresholds for clean-ups, would be rejected out of hand, and that "contaminated samples" would be accepted on a site specific basis. (Suburban Ex. 8). In its decision dated May 31, 1994, the DNR stated that:

> During the week of May 23, 1991, Laboratory Certification audits were conducted at both of your facilities (Waukesha and Hillside). After reviewing the deficiencies revealed in these audits we are convinced that laboratory operations shed significant doubt on the accuracy of GRO, DRO, PVOC and VOC data produced. All data analyzed prior to May 31, 1994 from these test categories is affected.
>
> We have divided the data into two groups: 1) samples used to determine that a site or boundary of a site is clean, "Clean Samples"; and 2) samples that showed significant contamination, "Contaminated Samples". Because samples that show significant contamination may have fulfilled their purpose, we felt it reasonable to treat them separately. "Contaminated Samples" will be

accepted on a site-specific basis. "Clean Samples" will be rejected. This applies to data generated at both facilities. (Sub. Ex. 8, DNR Ex. 59; Egre, 3/1-p. 45, Klopp, 2/28-p. 343; 3/3-p. 148; Mealy 3/1- p. 117).

7. Concerns relating to analytical data generated by Suburban-Wisconsin go back to 1991 when the laboratory was purchased and certification transferred to Suburban-Wisconsin.

8. On June 25, 1991, Donalea Dinsmore, an audit chemist for the Department, conducted an on-site evaluation of Alpha Environmental Lab's laboratory located at N8 W22520 B Johnson Drive, Waukesha, WI 53186. The report of the findings of this evaluation was issued as a Notice of Noncompliance (NON) dated September 7, 1991.

9. Suburban purchased the assets of Alpha Environmental Lab, including the laboratory located at N8 W22520 B Johnson Drive, Waukesha, WI 53186, effective October 1, 1991. Alpha's existing certification was transferred to Suburban at this time. The new owners accepted the obligation of bringing the lab into compliance with the applicable statutes and codes. In November 1991, the aforementioned NON was re-issued in the name of Suburban. (DNR Ex. 25; Dinsmore 3/2- p. 152-3).

10. During the period from October 1991 through November 1992, Suburban-Waukesha provided four (4) submissions to the Department in order to address the Notice of Noncompliance. In correspondence dated October 27, 1992, the Department notified Suburban that a re-evaluation was necessary to ensure that the laboratory was in compliance with Ch. NR 149, Wis. Admin. Code.

11. The Department worked with Suburban-Waukesha over an extended period of time in an effort to assist the lab to achieve compliance with Wisconsin's Laboratory Certification Code requirements. (DNR Ex. 28 & 38; Dinsmore, 3/2, p. 164-169).

12. On March 29, 1994 the LUST Program issued a Notice Of Noncompliance (NON) to Suburban-Illinois based on deficiencies found with the Tolkan Leasing LUST site data. (Sub. Ex. 102; Klopp, 3/3, p. 143).

13. On May 6, 1993, a letter was sent to Paul Giese of Giles Engineering Associates Inc. requesting documentation from Suburban to confirm the authenticity of the data provided for the Tolkan Leasing site. After review of the documentation provided by Suburban-Illinois, the DNR determined that the documentation did not validate the data provided by Suburban-Illinois for the Tolkan Leasing LUST site. The DNR determined that data provided

was not reliable and accurate and could not be relied upon for making a decision regarding this site. The decision to reject the data as not valid was communicated to Mr. Giles with Suburban Laboratories receiving a copy of this letter. (DNR Ex. 6-9; Klopp 2/28-p. 24-27).

14. On April 27, 1994 Department representatives met with Ray Thomas and Jay Thomas, owners of Suburban-Hillside and Suburban-Waukesha, and several officials from both of their laboratories to discuss the implications of the problems with data for LUST sites produced by their laboratories. At this meeting the Department informed Suburban that it had serious concerns about their data. The information previously provided by Suburban-Illinois was discussed again. At the meeting the DNR did not alter its decision to reject the data from Suburban-Illinois for the Tolkan site. The Department agreed to schedule audits for both of Suburban's laboratories for the last week of May 1994 at the close of the meeting. It was also decided that after the audits were completed, LUST program staff would make a determination concerning Suburban's data. Suburban was informed that if the Department made a determination that the data was not acceptable, Suburban would be given two weeks to contact their clients prior to any notification by the Department.

15. The Department sent a letter summarizing this meeting to Jarrett Thomas on May 12, 1994.

16. In May, 1994, the Department audited the two laboratories for compliance with the state Laboratory Certification regulations. (Thomas 2/27, p. 104, ln. 1-6). The Department audited the Waukesha, Wisconsin laboratory on May 23-24, 1994, and the Hillside, Illinois laboratory on May 25-27, 1994. Id.

17. On May 23 and 24, 1994, Richard Mealy and Donalea Dinsmore, both audit chemists with the Department, performed an on-site evaluation of Suburban-Wisconsin to determine whether corrective actions had been implemented to bring the laboratory into compliance with Ch. NR 149, Wis. Admin. Code. A total of one hundred and one (101) deficiencies were discovered during the evaluation. Twelve deficiencies previously identified during the 1991 audit were identified during the evaluation and documented in the evaluation report dated June 14, 1994 and were found not to have been corrected. In addition, forty five (45) deficiencies associated with testing capabilities expanded after October 1991 were identified during the May 1994 evaluation and documented in the evaluation report dated June 14, 1994. The auditors were not allowed to explain the impact of the deficiencies found during the audit.

18. The 101 deficiencies indicated that the laboratory had serious problems with its procedures. These deficiencies led the Department to the determination that Suburban's data for the stated LUST categories was highly questionable. (Dinsmore, 3/3/95, p. 8). The DNR had a good faith basis for believing that the integrity of LUST data generated by Suburban-Wisconsin was compromised by deficiencies identified in the May, 1994 audit.

19. The audit of Suburban-Wisconsin noted one hundred and one (101) deficiencies and accompanying violations of Ch. NR 149 Wis. Admin. Code. Twenty-eight (28) of these deficiencies were methods related, forty-one were quality control related, and thirty-two (32) were records related. These violations included deficiencies in Suburban's analysis or testing methods and equipment. The violations found were in several test categories, including the petroleum hydrocarbon category which includes gasoline range organics, ("GRO"), diesel range organics, ("DRO"), and petroleum volatile organic compounds, ("PVOC"). These violations were summarized in a letter and report to Mr. Jarrett Thomas dated June 14, 1994. (DNR Exhibit 59). Further, the Department concluded that there was no indication that procedures to deal with corrective action had been established; and that the Quality Assurance manual did not include any information pertinent to Wisconsin's LUST program, a program for which the laboratory had generated a substantial amount of data.

20. On May 25 and 26, 1994, Alfredo Sotomayor, Senior audit chemist with the Department, performed an on-site evaluation of Suburban-Hillside to determine if the laboratory was in compliance with Ch. NR 149, Wis. Admin. Code. The laboratory withdrew its certification during the audit, thereby avoiding any enforcement action. Mr. Sotomayor communicated to the laboratory that it had severe problems and would have been subjected to a NOV had it not withdrawn its certification.

21. The deficiencies discovered to exist for the LUST Program parameters were of such a magnitude, that they were believed to affect the reliability and consistency of the LUST analytical data produced by the Suburban-Illinois's laboratory. The results of the audit were conveyed to Lauric Egre, LUST Unit Leader and Christine Klopp, Program Chemist for the LUST program. The audit of Suburban-Hillside noted numerous deficiencies and violations of Ch. NR 149 Wis. Admin. Code. These violations included deficiencies in Suburban-Hillside's analytical methods, quality control program, records, and reporting practices. The deficiencies found were in several test categories, including the petroleum hydrocarbon category which includes diesel range organics, ("DRO"), and petroleum volatile organic compounds, ("PVOC"). These violations were summarized in a letter and report to Mr. Jarrett Thomas dated October 17, 1994.

Deficiencies related to PVOC and DRO analyses are contained in sections III A and III D of Exhibit X. (DNR Ex. 62). The October 17, 1994 letter to Jarrett Thomas stated that significant deviations from Code requirements were noted and that the Department would have issued a Notice of Violation (NOV) to Suburban-Illinois but the decision to withdraw the laboratory's certification made this unnecessary.

22. The Department took no action to suspend or revoke Suburban's certification prior to its May 31, 1994 decision rejecting Suburban's data and requiring blanket resampling. Thomas (2/27, p. 113 ln. 9-12). Well after the May 31, 1994, decision, on December 28, 1994, the DNR issued Order 94-COEE-001 revoking Suburban-Wisconsin's certification. On January 27, 1994, Suburban-Wisconsin filed a petition for review of Order 94-COEE-001. This matter is currently pending before the Division. At the joint request of the parties, review of the December 28, 1994, Order has been held in abeyance pending the outcome of the instant action.

23. Many of the deficiencies noted in the audits of both Suburban laboratories relate to non-compliance with the LUST Guidance, and the Wisconsin Modified GRO and DRO Methodologies which the ALJ finds as a matter of law were improperly promulgated rules. (See Findings 41-53). For example, Mr. Mealy, one of the Department's auditors, gave a long and technical dissertation on methanol solvent fronts and the addition of methanol. However, Mr. Mealy admitted that these issues relate solely to the Wisconsin-modified DRO and GRO methodologies. Mealy (3/2, p. 45 ln. 5-11; p. 51 ln. 3-11). In fairness it must be noted some of the audit deficiencies represented violations of properly promulgated code requirements, such as a failure to maintain records for corrective actions for GRO and DRO data as required by sec.149.06 (1)(f), Wis. Admin. Code (Mealy, 3/1, p. 128-33); and a failure to maintain records in a manner that allows for traceability of data from receipt through reporting as required by sec.149.06 (1)(a). The record in the instant action is not complete on the specifics of which deficiencies relate to the lawful authority of the Department under sec. 144.95, Stats., and Chapter NR 149, Wis. Admin. Code. Neither party addressed these issues in its brief. Said issues are central to the review of Order 94-COEE-001 which is currently pending before the Division. Resolution of these issues is not necessary to reach a decision in the instant matter.

24. Immediately following the audits, before the audit reports were issued, and without providing the laboratories an opportunity to respond to the Department's concerns about the laboratories (Thomas 2/27, p. 110, ln. 15-20), the Department issued a decision retroactively invalidating four categories of

data produced by the laboratories: DRO, GRO, PVOC and VOC. Suburban Ex. 8. The Department determined that "clean samples," which would indicate that any contamination was below the Department's threshold levels for cleanups, would be rejected out of hand, and that "contaminated samples" would be accepted on a site-specific basis. Id.

25. The Department made its determination regarding Suburban-Wisconsin and Suburban-Illinois' data without confirming whether the concerns noted in the audits had actually had any impact on data produced by the laboratories. Mealy (3/2, p. 112, ln. 6, p. 113, ln. 2).

26. The Department did not confirm the accuracy or inaccuracy of Suburban data through objective resampling results prior to its decision to retroactively reject Suburban laboratory data. (Mealy, 3/2, p. 112). The LUST Tank Response Unit Leader, Ms. Egre, conceded that the Department had the ability to undertake site inspections and perform tests to confirm results reported with Suburban data prior to entry of the Restraining Order entered by the Waukesha Circuit Court. (Egre, 3/3, p. 107). However, the Department made no effort to resample any site to determine if there was contaminated soil or groundwater remaining prior to its May 31, 1994 decision to retroactively reject Suburban data. Egre testified that the Department was concerned that contaminated groundwater, possibly posing a threat to human health, might go undetected due to the deficiencies in Suburban laboratory practices. However, Ms. Egre testified, "[w]e did not know for a fact that there [was] contaminated groundwater." Egre (3/3, p. 102). Although the Department had the ability and the authority to trace Suburban's data and determine if the data accurately reflected site conditions, the Department failed to resample, or to require resampling by a responsible party, at even one site prior to entering its decision to retroactively reject Suburban data.

27. Egre conceded that the Department lacked sufficient information to conclude that there was an emergency situation with respect to data analyzed by the Suburban laboratories. (Egre 3/3, p. 108, ln. 3-11). Indeed, the Department did not apply its policy of retroactively rejecting data to "closed sites," or even attempt to notify property owners whose sites had been closed based upon Suburban data. Egre (3/3, p. 102 ln. 3-8).

28. The Department introduced evidence, received well after the May 31, 1994 decision, that purported to show that resampling at one site found greater contamination than that reported by Suburban. However, the Department's evidence failed to prove greater contamination. DNR Ex.60, Klopp (3/3, p. 149 ln. 17 - p. 153 ln. 17; p. 159 ln. 8 - p. 175 ln. 2).

29. The Department did not provide Suburban with an opportunity for a contested case hearing prior to reaching its May 31, 1994, decision to retroactively reject certain data. Thomas (2/27, p. 113 ln. 22 - p. 114 ln. 1). Section 144.95(7)(i), Wis. Stats. and NR 149.42, require such a hearing in the context of formal suspension or revocation of laboratory certification. Egre testified that there was nothing that required the Department to issue its decision prior to Suburban going through the stepped enforcement process for certified laboratories, with attendant procedural protections including the right to a hearing. (Egre, 3/3, p. 98). The Department's own actions demonstrate that the Department's decision to reject Suburban's data was not an emergency, and that the Department could have awaited a hearing prior to issuing the decision.

30. Ms. Egre acknowledged that she, or other Department personnel, could have asked the Department to begin the process of rule-making for a rule to permit retroactive rejection of data, or could have asked the Natural Resources Board to issue an "emergency rule." Egre (3/3, p. 129 ln. 8-20).

31. The laboratories did not receive any reports of the audit until June 16, 1994 (Suburban-Wisconsin) and October 17, 1994 (Suburban-Illinois). See DNR Exs. 10 and 62.

32. The Department's decision with respect to Suburban-Wisconsin and Suburban-Illinois' data is identical to its determinations with respect to six other laboratories -- in fact, every laboratory where the Department has determined that it has questions about the validity of LUST data. See Suburban Exs. 29, 53, 103.

33. The policy of retroactively rejecting data was chosen by Department personnel from among alternatives as the best way to handle the issue of laboratory data, and was reviewed by supervisory personnel in the Department. See Suburban Ex. 103; Egre (2/28, p. 34, ln. 18 - p. 35, ln. 6); Klopp (2/28, p. 9, ln. 10-16).

34. Notwithstanding the Department's actions, Suburban-Wisconsin remains a fully certified laboratory under the Wisconsin laboratory certification program. Suburban Ex. 1.

35. Deficiencies at the laboratory and the Department's actions have destroyed Suburban-Wisconsin's business, effectively "decertifying" the laboratory, since the company has lost all of its customers in the LUST area, the goodwill it had developed over the last three years, and virtually all of its other business. Thomas (2/27, p. 130, ln. 19-22). Moreover, by raising doubts as to the acceptability of future data,

deficiencies at the laboratory and the Department's decision effectively "decertified" Suburban and took away its license to perform LUST work.

36. The May 31, 1994 decision itself was, by its terms, effective immediately. Suburban Ex. 8. Although the May 31, 1994 decision indicated that the Department would not notify Suburban's clients of the decision for two weeks, the letter did not indicate that the decision would be held in abeyance until Suburban had an opportunity to challenge the audits or the decision. Suburban Ex. 8.

37. Despite the fact that the Department provides laboratories 30 days to respond to an audit report, the May 31 decision was made before Suburban even received copies of the audit reports, and gave no notice of any opportunity to respond. See Mealy (3/1, p. 142 ln. 17-18); Suburban Ex. 8; Thomas (2/27, p. 110 ln. 7 - p. 111 ln. 11); Hitchens (3/1, p. 89 ln. 17-22); Healy (3/2, p. 109 ln. 15-17); Klopp (2/27, p. 359 ln. 13-16). Although NR 149.41(1) requires a laboratory to provide an audit response within 30 days, the Department granted Suburban-Wisconsin 60 days to respond. Yet the Department did not give Suburban any time to respond to the audit before the May 31 decision was rendered. DNR Ex. 2 was sent to Suburban on May 12, 1994. It does not, by its terms, suggest that Suburban could do anything to stop the Department's planned course of action. Similarly, the exit interviews did not provide Suburban with sufficient detail to respond to the Department's concerns in time to prevent the May 31, 1994 decision, which came less than a week later.

38. The auditors did not inform Suburban at the audit exit interviews that data would be rejected. Thomas (2/27, p. 108 ln. 22 - p. 109 ln. 10; p. 110 ln. 15-20; p. 105 ln. 3-8). The auditors merely informed Suburban that NOVs would be issued for the laboratories. Thomas (2/27, p. 104 ln. 10-22). Retroactive rejection of data is not a part of the stepped enforcement process used to discipline laboratories, and is not associated in the regulations with NOVs. Mealy (3/2, p. 116 ln. 16 - p. 117 ln. 4).

39. Department witnesses agreed that Suburban was not given an opportunity to defend its laboratory practices or otherwise address the Department's concerns prior to the May 31 decision. See Thomas (2/27, p. 110 ln. 15-20); Klopp (2/27, p. 347 ln. 3-6; p. 348 ln. 24-25; p. 349 ln. 1-4); Mealy (3/2, p. 92 ln. 2-6).

40. No exigent circumstances existed to justify the Department issuing its decision to reject Suburban's data without providing Suburban with meaningful notice and an opportunity for a hearing.

41. Contrary to sec. 144.95(7)(b), Stats. and Wis. Admin. Code sec. NR 149.11(1), the Department has failed to promulgate specific regulations regarding the "accepted methodology to be followed" by laboratories at LUST sites in Wisconsin. Instead, the Department has improperly relied upon and enforced compliance with the LUST Guidance, including the Wisconsin Modified DRO and GRO methodologies.

42. The Department administers its entire LUST program, with approximately 8000 active sites (Egre 3/3, p. 46), on the basis of a document known as the LUST Guidance, and a random newsletter titled the Release! News. See Suburban Ex. 17 at p. 2; Suburban Ex. 18 at p. 1. Both of these documents set forth substantive requirements that apply to owners, consultants, and laboratories conducting cleanups at LUST sites in Wisconsin, including the four specific types of samples that are at issue here: DRO, GRO, PVOC and VOC. Id.

43. The DRO and GRO methodologies were actually created by the Department; the PVOC and VOC parameters are also specific to Wisconsin, and are found only in the LUST Guidance document. See Klopp, 2/27, p. 319, ln. 18-20; p. 323, ln. 14, p. 324, ln. 11; p. 326, ln. 1-18); Mealy (3/2, p. 45, ln. 5-11); p. 51, ln. 3-11); Klopp (2/27, p. 320, ln. 5-10; p. 318, ln. 14-16); Thomas (2/27, p. 87, ln. 19 - p. 88, ln. 8; p. 184, ln. 3 - p. 185, ln. 17).

44. The LUST Guidance, and the Wisconsin Modified DRO and GRO methodologies, have never been promulgated as rules. Klopp (2/27, p. 324 ln. 12-14; 3/3, p. 140 ln. 21-25); Thomas (2/27, p. 79 ln. 21-25).

45. The LUST Guidance [Suburban Exhibits 16 (1992) and 17 (1993)] is issued by the Department to "describe how soil and groundwater samples collected at sites in Wisconsin having petroleum contamination (including underground storage tank sites) are to be analyzed." Suburban Ex. 17 at p. 2.

46. The Guidance requires that sampling must be performed for GRO, "[d]etermined by the Wisconsin Modified GRO Method," DRO, "[d]etermined by the Wisconsin Modified DRO Method," VOC compounds, "as listed in Section 11.1," and PVOC compounds, "as listed in Section 11.1." Suburban Ex. 16, p. 9, 13; Suburban Ex. 17, p. 22, 27.

47. The LUST Guidance is the only document that sets forth these particular Department requirements for analyzing soil and groundwater at petroleum contaminated sites in Wisconsin. See Klopp (2/27, p. 319 ln. 18-20; p. 323 ln. 14 - p. 324 ln. 11; p. 326 ln. 1-18); Mealy (3/2, p. 45 ln. 5-11; p. 51 ln. 3-11); Klopp (2/27, p. 320 ln. 5-10; p. 318 ln. 14-16); Thomas (2/27, p. 87 ln. 19 - p. 88 ln. 8; p. 184 ln. 3 - p. 185 ln. 17).

48. Site owners and their contractors must comply with its requirements in order to receive Department approval for the cleanup of a LUST site in Wisconsin. The Guidance, the Release News! (published to disseminate additional information between revisions of the Guidance), and the Department witnesses all confirmed that sampling and analysis of LUST sites in Wisconsin *must* conform to the Guidance requirements, or the work will be rejected. The Guidance itself states that "[t]o insure accuracy and consistency of analysis the methods specified in this document *are to be used at all LUST sites*." Suburban Ex. 16, p. 5.

> The Release News! also states that:
> [s]ite owners and consultants can expect that data which does not conform to the guidance will be found inadequate to define the degree and extent of contamination or to conduct remediation at LUST sites.

Suburban Ex. 18, p. 1 (column 2); Klopp (2/27, p. 312 ln. 2 - p. 313 ln. 1). See also Suburban Ex. 18 (first page of July 19, 1993 volume) (quoted in Klopp (2/27, p. 313 ln. 9 - p. 314 ln. 14) (directive to "begin using the revised LUST . . . Guidance, . . . Modified Gasoline Range Organics Method, and Modified Diesel Range Organics Method" is "effective July 26, 1993").

49. Suburban and all other laboratories doing business in Wisconsin understand that the LUST Guidance, and the Release! News are binding on their operations. Thomas (2/27, p. 81 ln. 6-17).

50. The LUST Guidance is the only place where the DNR has specified the precise list of VOC and PVOC parameters to be analyzed at a LUST site. Klopp (2/27, p. 320 ln. 5-10); see also Klopp (2/27, p. 318 ln. 14-16) ("entire PVOC list is Wisconsin's list"); Thomas (2/27, p. 79 ln. 21-25; p. 148 ln. 2-11).

51. Ms. Klopp, a DNR chemist and the author of the Wisconsin Modified DRO and GRO methodologies, admitted that the Wisconsin Modified DRO and Wisconsin Modified GRO methodologies have never been promulgated as rules. Klopp (2/27, p. 324 ln. 12-14; 3/3, p. 140 ln. 21-25).

52. Ms. Klopp confirmed that the Department's early concern about the Suburban-Illinois laboratory's PVOC analyses was that the method utilized by the laboratory (and approved by U.S. EPA) "was not allowed for use at LUST sites in Wisconsin as specified by the LUST Analytical Guidance." Klopp (2/27, p. 332 ln. 11-15).

53. The Department witnesses testified that at some point, the Department became concerned about the validity of data from a number of laboratories where audits had been performed. Egre (2/28, p. 30 ln. 2 - p. 31 ln. 5; 3/3, p. 47 ln. 13 - p. 48 ln. 3; p. 46 ln. 22 - p. 49 ln. 3); Mealy (3/2, p. 134 ln. 20 - p. 135 ln. 10); Klopp (2/27, p. 363 ln. 22 - p. 364 ln. 11; 2/28, p. 4 ln. 9 - p. 6 ln. 23). These concerns were discussed with supervisory personnel in the Department. Egre (2/28, p. 29 ln. 12-14; p. 34 ln. 18 - p. 35 ln. 6). With respect to at least eight laboratories, the Department proceeded to retroactively invalidate the data produced by each laboratory.

54. The Department memoranda and testimony elicited at the hearing establish that the policy to retroactively reject data was chosen by the Department from among alternatives, intended to apply to the laboratories at issue, and to future laboratories, and was reviewed at a "high level" within the agency.

In a memorandum dated March 17, 1994, Ms. Klopp and Ms. Egre noted that:

> The Laboratory Certification program recently audited Giles Engineering's laboratory and Quality Analytical Laboratories. Many serious deficiencies were identified with data from these laboratories. *In order to respond to this data consistently and in an expedient manner, we are developing procedures.*

Suburban Ex. 29 (emphasis added). The memorandum goes on to note that:

> We are considering the option of rejecting all GRO, DRO, and PVOC data generated by Giles due to the extent and profound nature of the deficiencies. *It is our preference to use this approach for all laboratories where audit findings show severe and widespread deficiencies.*

Id. (emphasis added). Finally, the memorandum concludes by stating that "[w]e are, of course, very interested in *preventing future dilemmas with lab data quality and are considering options.* If you have any ideas for procedures we can implement,

please let us know." Id. (underlined text emphasized in original; other emphasis added).

55. Ms. Klopp shortly thereafter provided a memorandum to all LUST personnel in the Department, entitled "How to handle laboratory data you suspect to be inaccurate." Suburban Ex. 103. The memorandum notes,

> As most of you know, we have been discovering more and more laboratories that have produced questionable and inaccurate data. In this memo *I will outline how we intend to approach this problem both in the short term and over the long term.*

Id. at p. 1 (emphasis added). The memorandum continues:

> When a Laboratory Certification audit identifies deficiencies with laboratory data that are both *serious and global we will use the same approach we have with the data from Giles laboratory.* We will determine whether to accept significantly contaminated samples on a site specific basis. Samples whose results are no detect will be rejected across the board.

Id. at p. 2 (emphasis added). This is precisely the policy the Department implemented with respect to each and every laboratory where the Department questioned the validity of the data.

56. In Suburban Exhibit 53, Paul Didier, the Bureau Director for the Bureau of Solid and Hazardous Waste Management, set forth in a chart, the Department's policy with respect to all the laboratories where data had been deemed suspect. For the eight laboratories -- Giles Engineering, Quality Analytical Laboratories, APL, Suburban Laboratories, Inc., Suburban Laboratories of Wisconsin, Inc., MRG, Precision Analytical Laboratories, and Iron Shore (aka Second Gen. Corp., aka Dyre) -- the policy is identical:

> <u>If data shows contamination</u>, can accept it. Do *not accept if necessary to have accurate result.*
>
> <u>If no detect or low detect</u>, do not accept for site closure or extent of contamination.

Suburban Exhibit 53 at Chart following page 5.

57. Ms. Klopp acknowledged that even the language of the Department's internal correspondence and correspondence to the various laboratories regarding the Department's position on the acceptability of the laboratory data was identical. Klopp (2/27, p. 365 ln. 3 - p. 370 ln. 9). See also Egre (2/28, p. 30 ln. 2 - p. 31 ln. 5; 3/3, p. 47 ln. 13 - p. 48 ln. 3; p. 46 ln. 22 - p. 49 ln. 3); Schneider (2/28, p. 88 ln. 14-17; p. 98 ln. 1-7); Mealy (3/2, p. 134 ln. 20 - p. 135 ln. 10); Klopp (2/27, p. 363 ln. 22 - p. 364 ln. 11; 2/28, p. 4 ln. 9 - p. 6 ln. 23); Suburban Exhibits 8, 9, 10, 11, 12, 29, 53, 59, 62, 103.

58. Ms. Klopp testified that once the Department established the policy to retroactively reject data, they specifically changed an earlier determination regarding the MRG laboratory in order "to make it more consistent with the other laboratory actions." Klopp (2/28, p. 9 ln. 10-16).

59. This policy was discussed with, and approved by, Mark Giesfeldt, the Department Section Chief for the Emergency and Remedial Response Program. Egre (2/28, p. 29 ln. 12-14; p. 34 ln. 18 - p. 35 ln. 6).

60. It is clear from the hearing testimony that the Department staff viewed the Department's decision regarding suspect laboratory data as a directive from the central office which was to be followed consistently. See Schneider (2/28, p. 87 ln. 10-11).

61. After the Department mailed its letter dated May 31, 1994 to Suburban, it proceeded to notify site owners that the data previously submitted from Suburban would not be accepted, and that if the owner wanted the Department to issue a "closure" letter for the site, or approve the scope of an investigation, or approve a remediation plan, "new samples [would] be required." Suburban Ex. 9 at p. 2; see also Thomas (2/27, p. 110 ln. 21 - p. 111 ln. 10; p. 130 ln. 16 - p. 131 ln. 4); Suburban Ex. 8.

62. The Department's policy of retroactively invalidating suspect data from laboratories was never properly promulgated as a rule. However, the Department's policy clearly meets the statutory and common law meaning of a rule in that it constituted a definite, consistent course of action implementing the Department's response to the problem of suspect LUST data from certified laboratories.

SUMMARY OF ISSUES, FINDINGS AND CONCLUSIONS

The following issues were noticed for hearing in this matter.

1. Did the Department violate Petitioners' right to due process of law?

   This is a constitutional issue outside the limited scope of the jurisdiction of an administrative agency established by the legislature. An administrative agency can address certain constitutional questions which bear directly upon its legislatively granted jurisdictional mandate. Milw. Board of School Directors v. WERC, 163 Wis. 2d 739, 472 N.W.2d 553 (Wis.Ct. App. 1991). However, the question of due process is a strictly constitutional question properly addressed by the judicial branch of government. The parties developed a record which should facilitate judicial review of this issue if such review is found to be necessary.

2. Were the Department's actions arbitrary and capricious?

   The Department's decision was arbitrary and capricious as a matter of law because it exceeded the DNR's regulatory authority. The classification of "clean" and "contaminated" samples reflected in the May 31, 1994, was rational and not arbitrary or capricious.

3. Did the Department's decision to require resampling of Petitioners' data exceed the agency's authority?

   The issue of whether or not the DNR has authority to require resampling of a responsible party under these provisions is not before the ALJ in the instant matter. Plainly, the answer to this question involves the rights of responsible parties which have not been heard in this proceeding. A case by case determination of this issue would be appropriate.

   The two provisions of sec. 144.76, Stats., relied upon by the DNR, subsections (3) and (8), do not authorize the Department to retroactively reject data from a certified laboratory prior to a hearing on the merits.

4. Did the Department rely on improperly promulgated rules?

   The Department relied upon its Program Guidance, the Wisconsin Modified DRO, and GRO methodologies and even the RELEASE! news publication in a manner which made these formal requirements of the LUST program and, effectively, improperly promulgated rules.

Similarly, the DNR established a formal policy relating to the retroactive rejection of suspect data from certified laboratories that grossly exceeded its regulatory authority.

5. Has the Department effectively decertified Petitioners without following its own procedures?

Following the May 31, 1994, decision and the notification of Suburban customers, the Suburban laboratories lost virtually all of its work relating to the LUST program. (Thomas 2/27, 130 and 138-39) However, some portion of this loss must be attributed to deficiencies at the laboratory.

6. Is the LUST data produced by Petitioner's laboratories valid?

The Department had a good faith basis to believe that LUST data produced by petitioner's laboratories was not valid. However, no resampling or other tests have been undertaken to objectively answer this question one way or the other.

7. Did Petitioners comply with approved Department methodology?

The audits made it clear that both Suburban laboratories were not complying with Department approved methodology. However, many of the problems at the two laboratories related to non-compliance with the improperly promulgated Guidance Document, and the Modified Wisconsin GRO and DRO methodologies. Because the May 31, 1994, decision of the Department clearly exceeded the DNR's regulatory authority, it is not necessary to sort out which problems at the Suburban laboratories are directly attributable to failure to comply with improperly promulgated rules. Further, these issues will likely be addressed in the review of Order 94-COEE-001 in DHA caption IH-95-08.

8. Is an administrative rule required to direct the Department in its decision to reject LUST data?

Without any statutory authority, the Department created a formal policy on how to deal with suspect data produced by certified laboratories. This policy met all of the legal definitions of a "rule". Accordingly, the Department should have formally promulgated a rule relating to this problem.

9. Would inaccuracies in LUST data from Petitioners affect Department decision(s) regarding closure of LUST sites?

Because the record does not definitively establish the reliability of LUST data produced by the Suburban Laboratories, it is difficult if not impossible to answer this question. Department experts provided opinion testimony that strongly suggests that the unknown objective answer to this question would be in the affirmative.

DISCUSSION

This case turns on one essential question: did the DNR have legal authority to retroactively reject certain LUST data produced by the Suburban Laboratories without first affording Suburban a hearing on the issue of whether the data was reliable? Because no such legal authority exists by virtue of explicit statute, administrative code, or "necessarily implied powers" which arise by fair implication of express powers, the Department's May 31, 1994, decision must be reversed.

There is no dispute that there is no explicit statutory or administrative code authority authorizing the DNR to retroactively reject data from a certified laboratory in the manner in which its May 31, 1994, decision was undertaken. The Department does have authority, under the Laboratory Certification Program Chapter 144.95, Stats. and sec. NR 149, Wis. Admin. Code, to undertake "revocation" of a laboratory's certification or registration. Chapter 144.95, Stats. and NR 149 detail precise and sequential procedures with respect to disciplining laboratories including audits, NON, and orders for suspension or revocation of certification. Sec. NR 149.42 Revocation of certification may be undertaken for specified failures of a laboratory to meet the requirements of the Laboratory Certification Program. Significantly, such revocation may occur only after the laboratory has an opportunity for a contested case hearing. In the instant action, the Department does not rely on its clear administrative authority to revoke the certification of a certified laboratory. Instead, the DNR asserts that two very general provisions of the Hazardous Substance Spills statute, sec. 144.76, Stats., grant the Department the "implied power" to retroactively reject laboratory data without a hearing in the manner of the May 31, 1994, letter. (See DNR brief 15-18).

Section 144.76(3), Stats., requires the Department to ensure that a responsible party take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of

the state. On its face, this provision clearly bears on the Department's authority to require site remediation, prevention of discharge and other measures of "(A) person who possesses or controls a hazardous substance which is discharged. . ." Id. Nothing in this statute even remotely gives the Department the implied authority to retroactively invalidate a certified laboratory's data without a hearing. Indeed, as Department counsel are well aware, even a "responsible party" under the spill statute is given the opportunity for a contested case hearing to object to a Department Order relating to such remediation measures.

Ms. Egre asserted at hearing that the Department's authority rested upon sec. 144.76(8), Stats., relating to Access to Property and Records. (Egre, 3/3/94, p. 104-105). Legal counsel for the Department must have recognized the absurdity of asserting this provision as grounds for retroactively rejecting data without a hearing, as they do not repeat this argument in their briefs.

These two provisions, each of them utterly unrelated to the regulation of laboratories by the Department, are the only two legal authorities cited by the Department as giving it the "implied power" to justify its arbitrary and capricious May 31, 1994, decision to retroactively reject Suburban Laboratories data without a hearing.

The DNR had a good faith reason to believe that there were deficiencies in the practices of both Suburban facilities which gave rise to doubts about the accuracy of GRO, DRO, PVOC, and VOC data produced from October, 1992 to May 31, 1994. It is obvious that the Department can not rely on suspect data in administering the LUST program. Department chemists and auditors properly sought some avenue to disregard data with which they had legitimate questions. However, in its understandable effort to reject suspect data from the Suburban laboratories, the DNR grossly exceeded its regulatory authority. In its brief, the DNR asserts that the only two responses available to the Department were: 1) for the DNR to accept data for which it had a good faith reason to suspect as being invalid; or, 2) to reject the data in the manner undertaken, which required the LUST program operating at the extreme margins of, indeed outside of, the limits of its legal authority. (DNR brief, p. 4, 17-18). This argument neglects the other valid options available to the Department. The most obvious alternative would have involved amending the enforcement provisions of the statute or NR 149 to include rejection of data from a certified laboratory under carefully drawn circumstances. (See: Egre, 3/3/95, p. 103-104). Further, the Department clearly has authority to promulgate Emergency Rules when it is confronted with a gap in its

regulatory authority which affects the health and safety of the public. Curiously, the Department witnesses testified that they were not aware of such an emergency and did not have sufficient information to make such a determination associated with the suspect Suburban laboratory data. (Egre, 3/3/94, p. 108). From the record it is clear that the Department had serious concerns about the Suburban-Wisconsin laboratory data for a period of nearly three years prior to entering its May 31, 1994, decision. This period provided ample time for the Department to amend the statute or promulgate new rules under the usual, non-emergency process of administrative rule-making.

Another lawful alternative available to the Department would have been quickly seeking revocation of the certification of the Suburban Laboratories under the procedural requirements of sec. NR 149, Wis. Admin. Code. As it was, decertification was sought only after the May 31, 1994, decision to reject data and after entry of the Circuit Court Order enjoining the Department from enforcing that decision. If the laboratory practices at Suburban-Wisconsin were of such concern to the Department, how did the laboratory manage to maintain its certification during the three year period in which the Department indicated it had concerns? The record does not provide a sufficient answer.

Finally, the LUST program, as distinct from the Laboratory Certification program, could have promulgated rules to address the specific problem of resampling suspect data from certified laboratories. Such rules could have been crafted in such a manner as to meet the Department's legitimate concerns that the DNR not be substituted for responsible parties in providing re-testing to confirm that closed or pending LUST sites were in fact sufficiently clean to warrant closure. Nonetheless, it is hard to understand why the Department would take the drastic action of retroactively rejecting a large quantity of data without first confirming, by its own resampling if necessary, that suspicions about laboratory data objectively resulted in errors on the ground at LUST sites.

The problems at the Suburban laboratories called for a creative legal strategy to ensure the integrity of LUST program data and to provide adequate opportunity for the laboratories to formally defend their practices. Instead, the Department developed an ad hoc policy, in effect a rule, based upon highly questionable, invalid legal authority. This ad hoc policy did not allow the Suburban Laboratories a sufficient opportunity to dispute the Department's decision to reject three years worth of laboratory data. Immediately following the May, 1994, audits, before even the audit reports themselves were issued and without providing the laboratories an opportunity to respond to the Department's concerns, the Department issued its decision

retroactively invalidating four categories of data produced by the two Suburban Laboratories. The decision to retroactively invalidate the data produced by the laboratories was undertaken prior to Suburban Laboratories having an opportunity to review and respond to the audit results. Suburban Wisconsin received the audit results on June 16, 1994. Suburban Illinois received audit results October 17, 1994. Suburban should of been afforded an opportunity to defend its laboratory practices before the Department took the drastic step of retroactively invalidating three years of lab data. The Department's own witnesses agreed that Suburban was not given an opportunity to defend its laboratory practices or otherwise address the Department's concerns prior to the May 31, 1994 decision. Further, no exigent circumstances existed to justify the Department's issuing its decision to reject Suburban's data without providing Suburban with an opportunity for hearing. This decision was in essence an improperly promulgated rule which had the effect of law and was issued by the Department to interpret its authority under the hazardous substance spill statute. The language of the March 17, 1994, memorandum spoke of the Department "developing procedures." This language is strikingly similar to the language ("adopting procedures") of a memorandum that the Court of Appeals found to be an improperly promulgated rule in State ex. rel. Clifton v. Young, 133 Wis. 2d 193, 200, 394 N.W.2d 769 (Wis. Ct. App. 1986). Like the memorandum in Clifton, the March 17, 1994, Department memorandum is not limited to a single laboratory, but it announces "general policies and specific criteria." Id.

The Department was operating at the extreme margins of its legal authority as provided by statute and properly promulgated administrative code provisions. The Department was required by statute to promulgate as Administrative Code provisions the accepted methodology to be followed by laboratories in conducting tests related to the LUST program operation under sec. 144.95(7)(b), Stats. Instead of promulgating rules as required by statute, the Department issued a guidance document which purported to be the only document that set forth department requirements for analyzing soil and groundwater at petroleum contaminated sites in the State of Wisconsin. The guidance document was clearly a statement of the Department's policy of general application having the effect of law which was used to implement the Department's authority under the hazardous substance bill statute. As such there is no question that the LUST guidance document was an improperly promulgated administrative rule within the meaning of sec. 227.01, Stats., and the case law definition set forth in Wisconsin Electric Power Company v. DNR, 93 Wis. 2d 222, 232, 287 N.W.2d 113, 118-119 (1980). Similarly, the Wisconsin Modified DRO and GRO methodologies both on their face set forth formal requirements of the program and meet the statutory and case law definition of an

improperly promulgated rule. Nor were either methods listed as acceptable "authoritative sources" within the meaning of sec. NR 149.03(5) and sec. NR 149.11(1)(c), Wis. Admin. Code.

Instead, the Department argues that "(w)hen methods are not available in authoritative sources that meet the needs of the department, the department may specify or allow methods from other sources." NR 149.11(1)(c), Wis. Admin. Code. The record does not support a finding that there were no other DRO or GRO methods available in authoritative sources. Indeed, Klopp testified that there were various other GRO and DRO methods available, including the EPA API draft method which the Wisconsin Modified Methods were based upon. (Klopp, 2128, p 20-21). Further, the GRO and DRO categories (along with the PVOC) are petroleum hydrocarbons, which are essential tests for LUST sites. It strains credulity that such essential categories are not subject to the statutory requirement under sec. 144.95(7)(b), Stats., that "(t)he department shall prescribe by rule the accepted methodology to be followed in conducting tests in each test category."

Further, the LUST program attempted to alter mandated legal requirements through the use of an intermittent, irregular newsletter, LUST RELEASE! The Department plainly exceeded its legal authority in substituting a newsletter for legal rule promulgation as required for certified laboratory facilities under sec.144.95(7)(b), Stats. The fundamental absurdity of this effort is reflected in Suburban exhibit 18. Substantive revisions to LUST Program Guidance were set forth in this occasional newsletter, which at least the Suburban Illinois facility did not always receive. The attendant problems of lack of notice and "moving standards" for certified laboratories inherent in this practice are as obvious as the fundamental violation of long held notions of administrative process. The DNR clearly has the authority to draft program guidance documents to assist the Department in the administration of a particular program. Nothing in this decision should be taken to discourage the appropriate, nonenforceable use of program guidance in administering complex environmental programs. However, the law is clear that the Department can not treat such program guidance as an enforceable legal requirement, as the LUST program has done in the instant matter.

The question of whether or not the Suburban-Wisconsin facility should be decertified remains for another hearing and another day. This action turns on the fact that the Department's stated legal authority for retroactively invalidating the data of Suburban does not hold up to close scrutiny. The Department's May 31, 1994 decision is accordingly reversed.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear Department of Natural Resources contested cases and issue necessary Orders pursuant to sec. 227.43(1)(b), Stats.

2. An administrative agency possesses only those powers which are expressly conferred or which may be fairly implied from the four corners of the statute under which the agency operates. State v. Department of Industry, Labor & Human Relations, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977); Racine Fire & Police Comm. v. Stanfield, 70 Wis. 2d 395, 399, 234 N.W.2d 307 (1975). The effect of this rule has generally been that statutes are strictly construed to preclude exercise of a power which is not expressly granted. Village of Silver Lake v. Dept. of Revenue, 87 Wis. 2d 463, 468, 275 N.W.2d 119 (1978); Racine Fire & Police Comm., 70 Wis. 2d 395 at 399. Any reasonable doubt about the existence of an implied power of an administrative agency should be resolved against the exercise of such authority. Tatum v. Labor and Industry Review Comm'n, 132 Wis. 2d 411, 421, 392 N.W.2d 840 (1986); Kimberly-Clark Corp. v. Public Service Commission of Wisconsin, 107 Wis. 2d 177, 181-82, 320 N.W.2d 5 (1981), aff'd, 110 Wis. 2d 455, 329 N.W.2d 143 (1983).

3. The Department possesses no express or implied statutory authority to retroactively invalidate data believed to be suspect prior to a hearing on the merits.

4. The hazardous substance spills statute authorizes the Department to require persons possessing or controlling hazardous substances to take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state. Sec. 144.76(3), Stats. This provision does not give the Department the express or implied authority to retroactively reject data from a certified laboratory.

5. Section 144.76(8), Stats. provides as follows:

> *ACCESS TO PROPERTY AND RECORDS.* Any officer, employe or authorized representative of the department, upon notice to the owner or occupant, may enter any property, premises or place at any time for the purposes of sub. (7) if the entry is necessary to prevent increased damage to the air, land or water of the state, or may inspect any record relating to a hazardous substance for the purpose of ascertaining the state of compliance with this section and the management rules promulgated under this section. Notice to the

> owner or occupant is not required if the delay attendant upon providing it will result in imminent risk to public health or safety or the environment.

This provision does not authorize the May 31, 1994 decision of the Department to retroactively reject data prior to a hearing on the merits.

6. The Department has no express or implied authority under the hazardous substance spills statute, sec. 144.76, Stats., to retroactively invalidate laboratory data without providing the laboratory a hearing on the merits.

7. The DNR Laboratory Certification Program regulates laboratories which perform tests in connection with a program which requires data from a certified or registered laboratory. NR 149.03(8) Wis. Admin. Code. A certified laboratory means a laboratory which performs tests for hire in connection with a "covered program" and which receives certification from the DNR. The LUST Program in the DNR Bureau of Solid and Hazardous Waste Management is "a covered program" requiring certified laboratories pursuant to sec. 144.95(1)(d)(8), Stats.

8. Certified laboratories must meet certain standards and are afforded certain procedural rights under sec. 144.95, Stats., and Chapter NR 149, Wis. Admin. Code. Certification under Chapter NR 149 is not the Department's "endorsement or guarantee of the validity of the data generated." See note following sec. NR 149.01, Wis. Admin. Code. The decision to retroactively reject data generated by the Suburban Laboratories was made by the LUST Program staff and not the Laboratory Certification Program.

9. The Wisconsin legislature and the Department have established an explicit mechanism by which the Department may discipline laboratories that are not in compliance with statutes or regulations governing certified laboratories. Section 144.95(7)(i), Stats. provides:

> If, <u>after opportunity for a contested case hearing</u>, the Department finds that a certified laboratory materially and consistently failed to comply with the criteria and procedures established by rule, it may suspend or revoke the certification of the laboratory.

Further, NR 149.42 contains nearly identical language, and adds, that "[a] laboratory's certification is valid until it expires,

is suspended or revoked." Wis. Admin. Code sec. NR 149.42(1). Among the provisions of NR 149.42 are the requirements that certified labs follow approved methods and report data accurately. Wis. Admin. Code sec. NR 149.42(a)(2) and (6)(b).

10. The Department did not provide Suburban with an opportunity for a contested case hearing prior to retroactively invalidating certain data from the two Suburban laboratories.

11. The deficiencies at the laboratory and the decision of the Department retroactively rejecting Suburban data effectively revoked Suburban's certification.

12. The Department's laboratory certification regulations require the Department to provide notice and an opportunity for a hearing before a laboratory's certification can be suspended or revoked.

13. No exigent circumstances existed which were sufficient to justify the Department issuing its decision to reject Suburban's data without providing Suburban with meaningful notice and an opportunity for a hearing.

14. It is a fundamental tenet of administrative law that an administrative agency is required to "'scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.'" Forte v. Ferris, 79 Wis. 2d 501, 511-12, n.6, 255 N.W.2d 594 (1977) (quoting U.S. v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969)); Yellin v. United States, 374 U.S. 109, 123-24 (1963).

15. An agency cannot arbitrarily waive or disregard its own rules in a particular case. Service v. Dulles;, 354 U.S. 363, 388 (1957); Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954).

16. As observed by the Wisconsin Court of Appeals in Metropolitan Greyhound and Management Corp v. Wisconsin Racing Board, 157 Wis. 2d 78, 690 (Ct. App. 1990):

> Although the standards imposed by [Chapter 227] are undoubtedly inconvenient to some administrative agencies, they represent the Legislature's attempt to the "justice," which, as Learned Hand once characterized it, is "the tolerable accommodation of the conflicting interests of society."

As further noted by the court in that case, "[s]ignificantly, and obviously, unlike the 'sentence first - verdict afterwards'

procedure employed by the Queen of Hearts, see L. Carroll, Alice's Adventures In Wonderland, Ch. 2 (1986), the decision in a contested case hearing is rendered 'after' the hearing." Id.

17. Section 144.95(7)(b), Stats. specifically requires that the Department "shall prescribe by rule the accepted methodology to be followed [by laboratories] in conducting tests . . . ." sec. 144.95(7)(b), Stats. (emphasis added). In response to this statutory mandate, the Department has promulgated general rules requiring that analytical methodologies be "appropriate for the test" and be "required by applicable state and federal regulations." See Wis. Admin. Code sec. NR 149.11(1).

18. The Department has failed to promulgate specific regulations regarding the "accepted methodology to be followed" by laboratories at LUST sites in Wisconsin. Instead, the Department has improperly relied upon and enforced compliance with the LUST Guidance, including the Wisconsin Modified DRO and GRO methodologies.

19. Section NR 149.11(1)(c), Wis. Admin. Code provides that an analytical methodology may "[b]e selected from an 'authoritative source' . . . if the methodology is not prescribed by state and federal regulations". The "note" following NR 149.11(1) lists the analytical methodologies required by state and federal regulations. The Wisconsin-modified DRO and GRO methodologies are not within any of the regulations listed. Moreover, "authoritative sources" are defined in the regulations, and do not include the Wisconsin Modified DRO and GRO methodologies. NR 149.03(5) Wis. Admin. Code.

20. It is well settled that an agency's action must be based on a logical rationale founded upon proper legal standards. Von Arx v. Schwarz, 85 Wis. 2d 645, 655, 517 N.W.2d 540, 544 (Ct. App. 1994) (quoting Van Ermen v. Department of Health & Social Services, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978)). Where the agency's action is unreasonable or does not have a rational basis, the action is arbitrary and capricious and is therefore void. Olson v. Rothwell, 28 Wis. 2d 233, 239, 137 N.W.2d 86 (1965). Where an agency bases its decision on an improperly promulgated rule, the decision is deemed arbitrary and an abuse of discretion. State ex rel Clifton v. Young, 133 Wis. 2d 193, 200, 394 N.W.2d 769 (Ct. App. 1986).

21. An administrative rule means a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency. Sec. 227.01(13), Stats. The statute

excludes a number of actions by an administrative agency from the definition of rule 227.01(13)(A-2p). None of the statutory exceptions fit the facts of this case.

22. The Wisconsin Supreme Court has held that the statutory definition of "rule" includes five elements:

1. a regulation, standard, statement of policy, or general order;

2. of general application;

3. having the effect of law;

4. issued by an agency;

5. to implement, interpret or make specific legislation enforced or administered by said agency as to govern the interpretation or procedure of such agency.

Wisconsin Electric Power Co. v. Department of Natural Resources, 93 Wis. 2d 222, 232, 287 N.W.2d 113, 118-19 (1980).

23. An agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute. Sec. 227.10(1), Stats.

24. In Wisconsin Electric Power Co., the Wisconsin Supreme Court found that the Department had failed to properly promulgate as rules chlorine limitations the Department had issued in a permit, and therefore the limitations were invalid and ineffective. 93 Wis. 2d 222. See also, Wisconsin Telephone Co. v. Department of Industry, Labor and Human Relations, 68 Wis. 2d 345, 228 N.W.2d 649 (1975) (guidelines issued by the Department of Industry, Labor & Human Relations regarding employment policies relating to pregnancy and childbirth were invalid because they constituted statements of general policy and should therefore have been properly promulgated as a rule). See also, Richard v. Traut, 145 Wis. 2d 677, 680, 429 N.W.2d 81 (1988) (it is an abuse of discretion when an agency bases its decision on a rule not properly promulgated); State v. Clifton, 133 Wis. 2d 193, 195-6) (department's determination resting on a rule not adopted pursuant to the requirements of Ch. 227 must be reversed).

25. It is well-settled that the failure to properly promulgate policies and standards as rules, renders the agency action void. Wisconsin Telephone, 68 Wis. 2d at 365-66.

26. It is an abuse of discretion when an agency bases its decision on a rule not properly promulgated; State v. Clifton, 133 Wis. 2d 193, 394 N.W.2d 769 (Wis. Ct. App. 1986) (department's determination resting on a rule not adopted pursuant to the requirements of Ch. 227 must be reversed).

27. In this case, the Department has engaged in and relied upon four improper administrative rulemakings: (1) the Leaking Underground Storage Tank ("LUST") Guidance; (2) the Wisconsin Modified DRO and (3) GRO methodologies); and (4) the Department's policy of retroactively invalidating laboratory data deemed suspect by the Department. Each of these constitutes an improper rule, not within any of the statutory exceptions.

28. The LUST Guidance and the Wisconsin Modified DRO and GRO methods meet all five elements of a "rule" in Wisconsin because:

(i) They are statements of "policy," or "regulations" or "standards,"

(ii) that apply to sampling and analysis at all LUST sites in the state,

(iii) which must be complied with by site owners,

(iv) that are issued by the Department,

(v) to implement, interpret, or make specific the requirements of the Wisconsin spill statute so as to govern the interpretation or procedure of the Department.

29. The references in NR 149.04 (Table 1) to "test categories" and "the specific analytical test analytes included in that test category and the key analyte which is the analyte which will be required for the reference sample analysis" do not amount to a promulgation of the specific methodologies. NR. 149.04(1), Admin. Code. The *methodologies* to identify these analytes which the statute requires to be set forth in a rule, are the Wisconsin Modified DRO and GRO methodologies.

30. Section 149.11(1)(c) provides that "[w]hen methods are not available in authoritative sources that meet the needs of the department, the department may specify or allow methods from other sources." The record does not support such a Conclusion with respect to the Wisconsin modified DRO and GRO methodologies.

31. The Department's specific authority relating to laboratories is set forth in the Wisconsin Administrative Code at NR 149, and details precise and sequential procedures for disciplining laboratories. Nothing in those regulations, or in the Spill statute itself, permits the retroactive invalidation of suspect data from laboratories.

32. The Department's decision to retroactively reject laboratory data meets the definition of a "rule."

33. The Department applied improperly promulgated rules in reaching its decision to reject Suburban's data. Accordingly, under the rule of Clifton, the Department's decision is similarly void. Stated alternatively, the Department's decision was not founded on proper legal standards and is therefore arbitrary and capricious. Von Arx, 185 Wis. 2d at 655.

ORDER

IT IS HEREBY ORDERED that the May 31, 1994, decision of the Department of Natural Resources to retroactively reject certain LUST data derived from Suburban Laboratories, Inc. and Suburban Laboratories of Wisconsin, Inc. be REVERSED, as the decision exceeded the regulatory authority of the Department of Natural Resources.

Dated at Madison, Wisconsin on October 11, 1995.

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By Jeffrey D. Boldt
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

ORDERS\SUBURLAB JDB

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.